



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 10, 1997

Mr. John A. Riley
Director
Enforcement Coordination and Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0304

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103631.

The Texas Natural Resource Commission (the "TNRCC") received a request from an individual's legal representative for "the investigative file pertaining to these[sic] complaints." TNRCC provided some of the information to the requestor, but it seeks to withhold portions of the requested information based on sections 552.101, 552.103(a), 552.107, and 552.111 of the Government Code. You enclosed marked representative samples of the information TNRCC seeks to withhold.¹

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. TNRCC has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. TNRCC must meet both prongs of this test for information to be excepted under section 552.103(a).

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

License revocation, suspension, or denial hearings are governed by the Administrative Procedures Act (the "APA"), Government Code chapter 2001. *See* Tex. Water Code Ann. §34.004(c). For purposes of section 552.103(a), this office considers a contested case under the APA to constitute litigation. Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to APA). You have shown that litigation is reasonably anticipated. After reviewing the documents, we conclude that they are related to the litigation. Therefore, TNRCC may withhold the requested documents under section 552.103.²

We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 103631

Enclosures: Submitted documents

cc: Mr. Carl Dawson
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770 South Post Oak Lane, Suite 525
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(w/o enclosures)

²As we resolve your request under section 552.103(a), we need not discuss the issues under sections 552.101, 552.107 and 552.111 of the Government Code.